

PRELIMINARY AND PRETRIAL HEARINGS

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PRELIMINARY HEARINGS

Key issues in preliminary hearings

- Petition authorization
 - Contest? Waive testimony?
- Removal of children, if requested, or ratification of emergency removal
- Parenting time if children were removed
- Any orders that the children need right away
- Statute: MCL 712A.13a. Court rule: MCR 3.965.

Preliminary hearing procedure

- Timing: Within 24 hours of removal, excluding Sundays and holidays. MCR 3.965(A)(1).
- Notice provided? LGAL present? MCR 3.965(B)(1).
- Thoughts about adjournments.
- Indian child or either parent member of a tribe? MCR 3.965(B)(2).
- Parent received petition? Wants it read? MCR 3.965(B)(4).
- Dismiss? Refer to alternate services? MCR 3.965(B)(5).
- Advise respondent of right to assistance of attorney. MCR 3.965(B)(6).
- Advise respondent of right to trial by referee, judge, or jury. MCR 3.965(B)(7).

Petition authorization

- Standard: Probable cause that one or more of the allegations in the petition are true and fall within the provisions of MCL 712A.2(b). MCL 712A.13a(2).
 - “...reasonable belief that a child is subject to [abuse or] neglect at the time jurisdiction is sought.” *People v Tennyson*, 487 Mich. 730, 771 (2010) (Corrigan, J., dissenting).
- To contest or not to contest? That is the question.
 - Rules of evidence do not apply. MCR 3.965(B)(12).
 - Would petition fail to hold up even if testimony supports allegations?
 - Allegations don’t fulfill requirements of MCL 712A.2(b)?
 - Do you think testimony will fail to support allegations?
 - Witness is weak, vulnerable to cross-exam?

Removal of children

- MCL 712A.13a(9); MCR 3.965(C)(2). Requires *all* of the following:
 - (a) Custody of child with parent presents substantial risk of harm to child's life, physical health, or mental well-being.
 - (b) No provision of service or other arrangement except removal is reasonably available to adequately safeguard the child from risk as described in (a).
 - (c) Continuing the child's residence in the home is contrary to the child's welfare.
 - "Contrary to the welfare of the child" includes, but is not limited to, situations in which the child's life, physical health, or mental well-being is unreasonable placed at risk. MCR 3.903(C)(4).
 - (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
 - Not required if aggravated circumstances case. MCR 3.965(C)(4).
 - (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.

More about removal

- The five-part standard tends not to be thoroughly litigated. Respondent has right to cross-examine witnesses, subpoena witnesses, and offer proofs. MCR 3.965(C)(1).
- Triggers ISP preparation requirement. 30 days. MCL 712A.13a(10).
- Most family-like setting available consistent with juvenile's needs. MCL 712A.13a(12).
- Reasonable efforts required to place siblings together unless agency documents that doing so would be contrary to safety/well-being. MCL 712A.13a(14)(a).
 - If separated, reasonable efforts required to provide sibling visits unless contrary to safety/well-being. MCL 712A.13a(14)(b).
 - Any agency decision to suspend sibling visitation/contact must be brought before court at next hearing. MCL 712A.13a(15)
- Any party can move for review of placement orders and ISP pending trial.

Emergency removal

- Officer may have removed the child already without a court order if there is reasonable cause to believe that the child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and immediate removal from those surroundings is necessary to protect health and safety. MCL 712A.14a(1); MCR 3.963(A)(1).
 - Must immediately contact court to seek order.
- Ex parte orders are available under MCL 712A.14b/MCR 3.963(B).
 - Petition or affidavit of facts. Can be submitted electronically.
 - MCL 712A.14a risk/harm standard applies along with reasonable efforts to prevent, no other remedy available, contrary to welfare to stay in home.
- If emergency removal, court must consider whether to continue removal at preliminary hearing under MCL 712A.13a(9) standard.

Additional considerations about removal

- MCL 712A.13a(4): Court may remove the abuser from the home if all apply:
 - Petition alleges abuse
 - Probable cause to believe alleged abuser committed the abuse
 - Presence of abuser in home presents substantial risk of harm to child's life, physical health, or mental well-being.
- MCL 712A.13a(5): If abuse alleged, court must remove child—even if abuser removed—unless conditions of custody are adequate to safeguard the child from risk of harm.
- Where will placement be? DHHS usually handles this, but court can override without sacrificing Title IV-E funding eligibility. The buck stops with the court.
- Agency must try to identify and locate relatives to determine if there's an appropriate relative placement. Relative preference. MCL 722.954a.

Parenting time

- Regular and frequent parenting time. MCL 712a.13a(13); MCR 3.965(c)(7).
 - At least one visit per week unless exigent circumstances.
 - Children need more than this.
- If the court determines that even supervised parenting time may be harmful to the child's life, physical health, or mental well-being, the court may suspend parenting time. The court may order the child to have a psychological evaluation or counseling, or both, to determine the appropriateness and conditions of parenting time.
- Think about conditions.
 - Supervised? By whom? Try for greater flexibility about frequency and duration.
 - Location (as natural/home-like a setting as possible)?
 - Frequency?
 - Duration?

Any needed orders for children

- Parents only subject to orders about services once adjudicated. *In re Sanders*, 495 Mich. 394 (2014).
- Important to think about what children might need in the meantime.
 - Mental health care?
 - Developmental evaluation?
 - Special education?
 - Medical and dental care?
 - Clothing, bedding, and supplies?
 - Therapeutic visitation?

Considerations: LGAL

- Where is the child? When will you visit?
- When will you interview the case worker? Collateral contacts?
- Is there family the child could go to? Should that happen?
- What are the child's routines? Are they being maintained to the extent possible?
- Can you get releases or orders to release any needed files or speak to people? Or will you take care of that later, perhaps through discovery?
- When will you see the DHHS file? MCL 722.627(2)(j).
- What are the child's needs? Do you need court orders?
- Thoughts about agreements with other parties?

Considerations: parent's counsel

- What is your client's story of the case?
- What preceded this case?
- What are your client's goals?
 - Related to reunification, visitation, placement, court process, relationship with agency, etc.
- Does your client understand what this case is about (e.g., have they read the petition) and what will happen?
- Interviewed case worker yet? Who else should you talk to?
- Any disability-related accessibility needs?
- Where is the child? Preferred placement? Removal proper?
- Visits: Where? How often? Duration? If more frequent schedule, can your client get there?
- Services client can start?
- Contest probable cause? Live to fight another day?
- Any room for agreements with other parties?
- When will you see DHHS file?

Considerations: DHHS counsel

- How tight is the petition? Need amending?
- How good will the case worker be as a witness, now and later?
- Any room to settle, agree on some aspects of case?
- Is your client following the law and its own policies, including keeping siblings together, finding relatives, and any ICWA/MIFPA issues?
- What is your client's position on parenting time, and why?
- What is your client's position on removal and placement, and why?
- What is your attorney-client relationship like? Room for counseling?

PRETRIAL HEARINGS

Key issues in and around pretrial hearings

- Placement
- Parenting time
- Will this go to trial? What kind of trial? Or will there be a plea?
- Discovery and investigation
- Motion practice
- Intent to offer hearsay statements under MCR 3.972(C)(2), and associated hearing
- Putative fathers

Placement and parenting time

- Always live issues.
 - A useful question in virtually any hearing: Why can't the children go home today?
- If keeping the children in placement is right, are the children in the right placement?
- Parenting time: regular and frequent. MCL 712a.13a(13); MCR 3.965(c)(7).
 - How have visits been going?
 - Get info from case worker, visit supervisor, parent, older children, and whomever else might know.
 - Are there problems? How to handle?
 - Increase visits? Liberalize them in some way?

Pleas

- MCR 3.971
- Two options: admissions or no contest.
 - No contest generally if civil or criminal liability is a possibility.
- If admitting, is it to all allegations? Some? An amended petition? Lots of options for working out cases.
 - Consider what will be left to prove if the case later goes to TPR.
- Plea to allegations sufficient to place the children under the court's jurisdiction under MCL 712A.2(b)(1), (2), or (3).
- Client counseling around pleas and the advice of rights can be challenging.

Pleas: advice of rights

- MCR 3.971(B)
- Ensure respondent understands allegations.
- Remind respondent of right to attorney if not yet represented
- Respondent waiving several rights:
 - Trial by judge or jury
 - Have petitioner prove allegations by preponderance of evidence
 - Have adverse witnesses appear and testify under oath
 - Cross-examine witnesses
 - Have court subpoena witnesses for respondent
- Plea may later be used as evidence in TPR proceeding
- Ensure plea is knowingly, understandingly, and voluntarily made

Going to trial

- A note: some respondents just want their day in court, even if they are going to lose. They want their story told. They want their kids to know that they fought for them.
- Trial types: judge, jury (judge must preside), referee
 - See MCR 3.911, 3.912, 3.913
 - Jury demand in writing within 14 days of notice of right to jury trial or 14 days after an appearance by an attorney or LGAL. No later than 21 days before trial. Court may excuse a late filing.
- Scheduling

Discovery

- Discovery is by right in these cases. MCR 3.922(A).
 - Generally, no motion considered unless you have first requested and not been given the materials.
- Request ASAP (rule: no later than 21 days before trial).
- It is not fully two-way discovery.
 - Petitioner must hand over:
 - Statements by respondent or juvenile that are in the possession or control of petitioner or a law enforcement agency.
 - All nonconfidential statements made by any person with knowledge of the events that are in the possession or control of petitioner or a law enforcement agency.
 - A list of all physical or tangible objects that may be evidence and that are in the possession or control of petitioner or a law enforcement agency.
 - Parties must exchange witness and exhibit lists. Also results of scientific, medical, or other expert tests, including associated reports or findings of all experts.

Investigate

- The facts, not competing interpretations of law, generally determine the outcome of these cases.
- Get records, preferably certified
 - DHHS
 - Medical, dental, mental health
 - School
 - Substance use/abuse-related
- Interview collateral contacts
- Things that help guide your investigation:
 - Theory of the case—shapes and is shaped by investigation
 - Write a closing argument first and work backward
 - Make a chart of allegations, relevant legal rules, and associated evidence, including how you'll obtain it.

Motion practice

- Governed by MCR 2.119. See MCR 3.922(C).
- No motions for summary disposition. *In re PAP*, 247 Mich. App. 148 (2001).
- Think about motions regarding parenting time, placement, discovery if at an impasse.
- Also evidence. Consider motions *in limine*.
 - There can be multiple layers of hearsay in certain child protection documents, and it's inefficient to hash those out on the spur of the moment in court.
 - Can and should also negotiate about these issues.

Tender years hearsay exception

- MCR 3.972(C)(2)
- Allows testimony by a person who heard a child's statement about abuse or neglect.
- Statement by a child under 10 years of age, or an individual under 18 years of age who has a developmental disability.
- Testimony in lieu of or in addition to child's testimony.
- Requires a hearing before trial to determine whether the circumstances surrounding the giving of the statement provide adequate indicia of trustworthiness.
- See MCR 3.972(C)(2)(b) & (c) about impeachment.

Putative fathers

- MCR 3.921(D)
- Limited rights
 - Notice by service or publication, depending on whether identified and whether whereabouts are known
 - Hearing to determine whether there's a preponderance of the evidence that establishes that the putative father is the natural father and should be allowed 14 days to establish paternity (time can be extended for good cause). Or that another person may be the natural father, or that the identity of the natural father cannot be determined.
 - If identity cannot be determined, then no further notice needed.
 - Putative fathers cannot be respondents in child protection proceedings unless they fall under the definition of a nonparent adult.
- See *In re KH*, 469 Mich. 621, 630 n.15 (2004) (noting putative father cannot be a respondent in a TPR proceeding).